



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 25, 1998

Ms. Julie B. Ross
Haynes and Boone, L.L.P.
201 Main Street
Suite 2200
Fort Worth, Texas 76102-3126

OR98-2867

Dear Ms. Ross:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120148.

The Coppell Police Department (the "department") which you represent received a request for the Internal Affairs investigation files of David Lover, Daniel Harm, and Lisa Andrus. You contend that the requested information is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. You have submitted a representative sample of documents to this office for review.¹

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You contend that Internal Affairs Investigation No. 97-085, submitted as Exhibit 2-A, is excepted from public disclosure by common-law privacy as encompassed by section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 at 4 (1976) (construing statutory predecessor to Gov't Code § 552.101). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683; *see also* Open Records Decision Nos. 470 (1987) (concluding that a person broke out in hives as a result of severe emotional distress is excepted by common-law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common-law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/ seizures, or emotional/mental distress is protected by common-law privacy). However, the public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion, or promotion. Open Records Decision No. 444 at 5-6 (1986); *see also* Open Records Decision No. 208 (1978) (disciplinary action against public employee available to public).

After a review of the documents, we conclude that most of the information in Exhibit 2-A is of legitimate public interest since it involves disciplinary action against a public employee. We have marked the information that you must withhold under common-law privacy and section 552.130.³ You must release all other information not excepted from public disclosure under section 552.101, 552.103, or 552.130.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

³Section 552.130 of the Government Code excepts from public disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

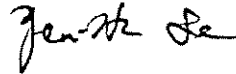
You have submitted a Verified Petition to Perpetuate Testimony of Employees of the City of Coppell which states that the petitioner, a former employee, "anticipates she will be a party to a lawsuit for wrongful termination, negligent and/or intentional infliction of mental distress, and various causes of action for unlawful and discriminatory employment practices." In addition, you have submitted an affidavit from the attorney representing the city in connection with the termination of the former employee which avers that, during a court hearing, the former employee's attorney "represented that [his client] planned to sue the city for wrongful termination if her termination was not overturned and she was not reinstated to her job with the Police Department." We have considered your arguments and the submitted materials and conclude that you have shown that litigation is reasonably anticipated. We have reviewed the information at issue and agree that some of the information is related to the anticipated litigation: internal affairs files 98-015, 98-083, and 98-121. We have marked the information that you may withhold under section 552.103. You have not adequately explained how the remaining information, internal affairs files 97-059 and 97-085, relates to the anticipated litigation.

We note that the submitted documents include documents that have been obtained from or provided to the opposing party. Information that has either been obtained from or provided to the opposing party in the anticipated litigation through discovery or otherwise is not excepted from disclosure under section 552.103(a), and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982), and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref: ID# 120148

Enclosures: Marked documents

cc: Mr. Arthur H. Kwast
P.O. Box 1397
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(w/o enclosures)